

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

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COURT OF APPEALS, DISTRICT OF COLUMBIA

APRIL TERM, 1929

No. 5038

739

J. RAYMOND McCARL, COMPTROLLER GENERAL, AND
CHARLES FRANCIS ADAMS, SECRETARY OF THE
NAVY, APPELLANTS

vs.

ALLISON A. BROCK, APPELLEE

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA

FILED AUGUST 30, 1929

COURT OF APPEALS, DISTRICT OF COLUMBIA

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(a) Supreme Court of the District of Columbia

ALLISON A. BROCK, PLAINTIFF

vs.

J. RAYMOND McCARL, COMPTROLLER GENERAL,
and Charles Francis Adams, Secretary of the
Navy, Defendants

} Equity No. 49630

UNITED STATES OF AMERICA,

District of Columbia, ss:

Be it remembered, that in the Supreme Court of the District of Columbia, at the city of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had, in the above-entitled cause, to wit:

1 *Bill of complaint*

Filed April 2, 1929

In the Supreme Court of the District of Columbia

ALLISON A. BROCK, PLAINTIFF

vs.

J. RAYMOND McCARL, COMPTROLLER GENERAL,
Charles Francis Adams, Secretary of the
Navy, defendants

} Equity No. 49630

The plaintiff Allison A. Brock respectfully shows to the court:

1. He is a citizen of the United States, a chief pay clerk (retired), U. S. Navy, and resides in Los Angeles, California.

The defendant J. R. McCarl is a citizen of the United States, is Comptroller General of the United States, and resides in the District of Columbia.

The defendant Charles Francis Adams is a citizen of the United States, is Secretary of the Navy, and resides in the District of Columbia.

2. The plaintiff is and for many years has been a chief pay clerk, U. S. Navy; that he was such on the active list until recently when he was retired, since which he has been and now is a chief pay clerk, U. S. Navy, retired, and on the inactive list of the Navy; he has at all times faithfully discharged his duties as an officer of the Navy. As such officer he has been and is entitled by law to be paid and to receive certain pay and allowances provided by acts of Congress, and during the period of his service he has received his pay and allowances as so provided except as hereinafter set out.

3. That during a part of said active service he was paid as an officer with dependents (a dependent mother and wife), and during a part of said service he was denied his dependency allowances. In 1923, and at various times thereafter, defendant J. R. McCarl, pretending to act within the functions of his office as Comptroller General and with the purpose of withholding from plaintiff the pay and allowances provided as aforesaid, ruled that plaintiff was not entitled to payments theretofore made to plaintiff of certain com-

mutation of quarters, light, and heat on account of dependents and was not entitled to dependency allowances, payment of which had theretofore been made to plaintiff, and so notified the Navy Department, and threatened to disallow and did disallow or suspend the amounts of said payments so made to plaintiff in the accounts of the disbursing officers who had made said payments; whereupon by the order, direction, or action of the then Secretary of the Navy, plaintiff was notified of the said ruling and the said actual or threatened suspensions and disallowances in the accounts of the said disbursing officers, and thereupon the then Secretary of the Navy or his subordinates in the Navy thereto authorized ordered that the pay of plaintiff be thereafter checked, stopped, and withheld to make good the said payments of commutation and dependency allowances which had been made to plaintiff and which the Comptroller General had held to have been erroneously made; and thereupon in accordance with said ruling of the Comptroller General and

3 with the purpose of collecting out of plaintiff's pay the said payments for commutation and dependency allowances and the orders or action of the Navy Department, there were checked against and withheld from plaintiff's pay amounts as follows:

During the year 1923.....	\$213. 52
July, August, September, and October, 1925.....	180. 00
July 1, 1926.....	560. 00
July 1, 1927.....	226. 67
July 1, 1928.....	120. 00

Accordingly and in compliance with said ruling of the defendant McCarl, Comptroller General, and said administrative action of the Navy Department, a total amount of \$1,300.19 has been withheld from plaintiff's pay; and the defendants, J. R. McCarl, Comptroller General, and Charles Francis Adams, Secretary of the Navy, are now withholding said amount of \$1,300.19 from plaintiff's pay or are causing the same to be withheld and will continue to withhold the same or cause it to be withheld unless they are restrained and enjoined from so doing by this court.

4. Plaintiff denies any liability whatever on account of said alleged overpayment or said alleged erroneous payment of allowances or by reason of said ruling of defendant J. R. McCarl or by reason of the administrative action of the Navy Department; he is advised that he is entitled to receive his full pay and allowances as provided by Congress, unaffected by said ruling and administration; that the said defendants have not the right to withhold or cause the withholding of his pay and allowances as an officer of the Navy or any part thereof or to set off any part thereof against the said alleged erroneous payment of allowances; that said defendants, J. R. McCarl, Comptroller General, and Charles Francis Adams, Secretary of the Navy, are

4 without right or authority to withhold plaintiff's pay or allowances or any part thereof, and that such withholding of his pay was and is an unlawful invasion of the rights of the plaintiff resulting in irreparable injury to him against which he has no adequate and complete remedy save in a court of equity.

Wherefore, the premises considered, the plaintiff prays:

1. That the process of this court issue to each of the defendants requiring him to appear and answer this bill.

2. That the defendants J. R. McCarl, Comptroller General, and Charles Francis Adams, Secretary of the Navy, be restrained and enjoined pendente lite and permanently upon the final hearing of this cause from and against any and all interference with any disbursing officer of the Navy to prevent the payment to the plaintiff of the sum of \$1,300.19 now due and unpaid to him on account of his pay and allowances as a chief pay clerk in the United States Navy and from withholding or causing the withholding of any part of plaintiff's pay and allowances for the purpose of liquidating the said disputed claim for the said \$1,300.19 arising on account of alleged overpayment to the plaintiff of that amount for commutation of quarters, heat, and light and of dependent-mother allowances.

3. That the said defendant, Charles Francis Adams, be enjoined and commanded to cause to be paid to the plaintiff the said sum of \$1,300.19 and any and all sums withheld from plaintiff's pay and allowances by reason of said ruling of the defendant J. R. McCarl and the action of the Navy Department and to continue to pay or cause to be paid to the plaintiff his regular pay and allowances in the usual and customary way in which officers of the Navy are paid.

5 4. That a rule issue to the defendants and each of them requiring them and each of them to appear at the time to be fixed therein and show cause, if any they have, why they and each of them should not be restrained and enjoined as aforesaid pending the final hearing of this cause.

And for such other, further, and general relief as the nature of the cause may require.

ALLISON A. BROCK.

SAMUEL T. ANSELL,

GEORGE M. WILMETH,

Attorneys for Plaintiff.

STATE OF CALIFORNIA,

County of Los Angeles, ss:

I, Allison A. Brock, under oath state that I have read the foregoing bill of complaint by me subscribed and know the contents thereof and that the matters and things therein set forth I verily believe to be true.

ALLISON A. BROCK.

Subscribed and sworn to before me this 27th day of March, 1929.

[SEAL.]

OTTO C. VALENTINE,
Notary Public.

My commission expires September 6/30.

Separate answer of J. Raymond McCarl, Comptroller General of the United States, to the bill of complaint

Filed April 25, 1929

* * * * *

6 Comes now the defendant, J. Raymond McCarl, Comptroller General of the United States, and with all due respect to the court, objects to its jurisdiction in the instant matter and without submitting himself thereto, but appearing specially herein, says, in answer to the bill of complaint, as follows:

1-2. He admits the averments of paragraphs 1 and 2 of the plaintiff's bill of complaint, that he is a citizen of the United States, is Comptroller General of the United States, and resides in the District of Columbia for the purpose of performing his official duties as Comptroller General of the United States; further answering the said paragraphs 1 and 2 he denies personal knowledge concerning the averments therein referring directly to the plaintiff and to the defendant Charles Francis Adams, Secretary of the Navy, but says in answer thereto that the status of the plaintiff as a chief pay clerk, United States Navy, active and retired, and the manner in which he has discharged his duties as such are matters of official record in the Navy Department and are not for answer by this defendant except as is hereinafter set forth concerning the manner in which the plaintiff has obtained public funds not authorized to be paid to him under the law.

3. He denies the averments in paragraph 3 of the bill of complaint, as made, averring the facts in that respect to be as disclosed by the official records on file in the General Accounting Office and not otherwise, to wit:

The act of April 16, 1918, 40 Stat. 530, and the superseding act of June 10, 1922, 42 Stat. 625, which became effective July 1, 1922, prescribed the degree and character of dependency required to be established by an officer claiming dependency allowances before any payment thereof to him by a disbursing officer would be authorized. The plaintiff, however, was paid dependency allowances without his having established such dependency, and in the performance of the duties and in the exercise of the discretion imposed upon him by law, this defendant, the Comptroller General of the United States, in the settlement and adjustment of the official accounts of the several Navy disbursing officers from whom the plaintiff obtained payments of pay and allowances, discovered deficiencies which represented improper and illegal payments of dependency allowances the said disbursing officers had made to the plaintiff between September 14, 1921, and March 31, 1927, over and above the pay and allowances authorized for the plaintiff by acts of Congress and in excess of what appropriations made by the Congress were available to pay; therefore credit for these improper and illegal payments to the plaintiff was disallowed the responsible disbursing officers in the settlement and adjustment of their several disbursing accounts, and this determination respecting the accounts of the responsible disbursing officers and the amount lawfully due the plaintiff under existing appropriations, by statutory law is made conclusive on the executive branch of the Government and is not subject to be reviewed in this proceeding for an injunction. (Section 7, act July 31, 1894, 28 Stat. 206, and section 236, Revised Statutes, as amended by sections 304 and 305, act June 10, 1921, 42 Stat. 24.)

Further answering, this defendant declares that the aforesaid Navy disbursing officers thus having become liable to have their own compensation stopped entirely, pursuant to the provision in section 1766, Revised Statutes, prohibiting the payment of compensation to an officer found in arrears in his accounts, and their sureties likewise having become liable to satisfy the United States for the unauthorized payments from the public funds they had

made to the plaintiff, undertook to discharge their several obligations to account by collecting the amount of the overpayments from the plaintiff, and collection has been reported to have been made of the sum averred by the plaintiff, \$1,300.19, through debit adjustments in the plaintiff's compensation account, which debit adjustments, accomplished in part at the plaintiff's suggestion and with his consent, as hereinafter more fully is set out, and for the purpose of showing a correct balance in plaintiff's account under the law, constitute the withholding of the plaintiff's pay and allowances alleged in the bill of complaint.

The several overpayments involved and the corresponding debit adjustments were made during periods as follows:

<i>Overpaid</i>		<i>Debited</i>	
Sept. 14, 1921, to Mar. 8, 1922 (by J. H. Theis) -----	(1) \$213.52	Jan. 1, 1923, to Feb. 10, 1923 (by A. B. McKay) -----	(1) \$213.52
Feb. 11, 1923, to June 30, 1923 (by W. F. Jones) -----	(1) 186.67	July 1, 1925, to Oct. 31, 1925 (by B. Berkowitz) -----	(1) 180.00
July 1, 1923, to Dec. 20, 1923 (by W. F. Jones) -----	(2) 226.67	July 1, 1927, to Sept. 30, 1927 (by W. Elliott) -----	(2) 226.67
Nov. 1, 1925, to Jan. 31, 1926 (by N. J. Halpine) -----	120.00	July 1, 1927, to Sept. 30, 1927 (by W. Elliott) -----	120.00
Feb. 1, 1926, to June 31, 1926 (by W. Elliott) -----	(3) 200.00	July 1, 1926, to Sept. 30, 1926 (by W. Elliott) -----	(3) 200.00
Feb. 1, 1926, to June 30, 1926 (duplicate payment by W. Elliott) -----	(3) 200.00	April 1, 1927, to June 30, 1927 (by W. Elliott) -----	(3) 200.00
July 1, 1926, to Mar. 31, 1927 (by W. Elliott) -----	(4) 360.00	April 1, 1927, to June 30, 1927 (by W. Elliott) -----	(4) 360.00
			(3)
Total -----	1,506.86		1,500.19

9 Notes explanatory of above statement:

(1) The \$393.52 "collected * * * by stoppage of pay" for payments "obtained * * * prior to July 1, 1923," by the plaintiff may not be "refunded" to him except there be established a compliance with the conditions prescribed in the act of May 26, 1926, 44 Stat. 654, as hereinafter more fully explained in paragraph 4 of this answer.

(2) Concerning this item of \$226.27, the Secretary of the Navy addressed a communication to the plaintiff July 11, 1927, as follows:

"2. * * * the department considers that you should promptly refund the sum of \$226.67, the amount disallowed in the accounts of Lieutenant Jones, Supply Corps, by reason of increased allowances paid to you on the ground which you failed satisfactorily to substantiate and which you have since rejected in favor of a totally different ground.

"3. You will endorse hereon, with a prompt return of papers, your intentions relative to refunding the above sum of \$226.67, for which sum the department considers for the reasons above stated, you are justly indebted to the Government."

An endorsement to this letter of the Secretary of the Navy was executed by the plaintiff August 6, 1927, *agreeing to make refund* by having his compensation stopped as follows:

"2. My account is now being checked \$440 by Lieutenant W. Elliott (SC), U. S. N., on account of the General Accounting Office in certificate No. K-8452-N dated May 18, 1927, having refused to accept copy of marriage certificate for crediting the allowance while carried on his rolls from February 1, 1926, and I have not drawn any money since May 31st, excepting subsistence allowance.

"3. I am willing for checkage to be made, however, I do not acknowledge that I was not entitled to the credit."

It has been held by this court in the case of *Harant v. McCarl, etc.*, Equity No. 47038, in a memorandum opinion by Mr. Justice Hoehling rendered November 22, 1927, that where a plaintiff has thus consented as well as requested in writing that collection from him be made through deductions from his pay injunctive relief is not authorized. This defendant, Comptroller General of the United

10 States, accepted the plaintiff's written consent as a proper authority for the withholding of his pay and allowances and allowed credit in the account of the responsible disbursing officer for the collection thus made; this defendant, moreover, has recognized the binding force of the decisions of this court and of the Court of Appeals of the District of Columbia and has refused to allow credit in the accounts of the responsible disbursing officers who made collection from the plaintiff by deductions in his pay and allowance account without the written consent of the plaintiff in which connection attention is invited to the copies of letters addressed to Disbursing Officers W. Elliott and N. J. Halpine, February 2, 1928, and January 4, 1929, and attached as Exhibit A and Exhibit B, respectively.

The plaintiff, under the *Harant case*, cited, is not entitled to have payment of this item of \$226.67 directed by injunction.

(3) One of the items of \$200 represents a duplicate debit and credit adjustment in the plaintiff's account for the period February 1, 1926, to June 30, 1926, and is not included in the \$1,300.19 of which the plaintiff seeks to have payment directed in this proceeding but is included in the statement merely for purposes of showing the true record.

(4) The credit and offsetting debit adjustment of this \$360 in the plaintiff's account during the fiscal year 1927 (July 1, 1926, to June 30, 1927), neither resulted in increasing or decreasing his pay and allowances as authorized in that fiscal year's appropriation act and the including of such item by the plaintiff in the sum of \$1,300.19 of which he prays to have refund directed constitutes a direct claim for pay and allowances payment of which has been determined by

11 this defendant, Comptroller General of the United States, not to be authorized, and it has been determined by this court the payment of such an item is not authorized to be directed by a writ of mandamus or a decree for mandatory injunction. See the decision of June 10, 1927, by Mr. Chief Justice McCoy in the case of *United States ex rel Metellus Thompson, Jr., v. J. Raymond McCarl, etc.*, Law No. 73173, and the memorandum opinion of Mr. Justice Hoehling, dated November 21, 1927, in the case of *James R. Jacobs v. Dwight F. Davis et al.*, Equity No. 47040.

4. For answer to the averments in paragraph 4 of the bill of complaint this defendant, Comptroller General of the United States,

refers to the statement of account and the notes explanatory thereof contained in his answer to question 3 and to the act of May 26, 1926, 44 Stat. 654, which provides:

"That the Comptroller General of the United States is hereby authorized and directed to allow credit in the accounts of disbursing officers for payment of commutation of quarters, heat, and light under the act approved April 16, 1918 (Fortieth Statutes, page 530), because of a dependent parent, and as rental and subsistence allowance under the act of June 10, 1922 (Forty-second Statutes, page 625), because of a dependent mother, made in good faith by disbursing officers prior to July 1, 1923: *Provided*, That where the payee responded to a needy family condition in an amount at least equal to the allowances obtained by him no collection shall be made on account of payment of the allowances to him prior to July 1, 1923; and amounts heretofore collected as refund of the allowances obtained in such cases prior to July 1, 1923, notwithstanding the protest of the payee, either by stoppage of pay, payment in cash, allotment of pay, or offset, shall be refunded; but this proviso shall not be applicable where the payee has admitted there was no dependency on him, or where he has refused to furnish evidence of the dependency, or where the payee has voluntarily refunded the payments in whole or in part, or has submitted no claim for the allowances in the nature of a protest against offset of his pay as refund of the payments."

Any claim the plaintiff may have for the items of \$213.52 and \$180 debited in his account to satisfy unauthorized dependency allowance payments he "obtained * * * prior to July 1, 1923," was
12 and is a matter exclusively for the consideration of this defendant, Comptroller General of the United States, pursuant to section 236, Revised Statutes, as reenacted in section 305 of the act of June 10, 1921, 42 Stat. 24, or for the consideration of the United States Court of Claims pursuant to section 1, act of March 3, 1887, 24 Stat. 505, as amended by section 145, act of March 3, 1911, 36 Stat. 1136, or pursuant to section 1063, Revised Statutes, as amended by section 148, act of March 3, 1911, 36 Stat. 1137, and sections 301, 304, and 306, act of June 10, 1921, 42 Stat. 23, 24.

In the case of the plaintiff the conditions prescribed in the cited act of May 26, 1926, which must be met before refund to him of the items of \$213.52 and \$180 is authorized, have not been met, and the determination of this defendant, Comptroller General of the United States, exercising the discretion and discharging the official duties imposed upon him by statutory law, that the plaintiff is not entitled to refund of those items aggregating \$393.52, is not subject to review in this proceeding for mandatory injunction; this court, moreover, being precluded by section 2 of the Tucker Act (act of March 3, 1887, 24 Stat. 505), as amended by section 2, act of June 27, 1898, 30 Stat. 495, from asserting any original jurisdiction over a claim for compensation by an officer of the United States, and no facts being set out in the bill of complaint or otherwise brought to the attention of this court which would permit of a determination on the merits of the plaintiff's right to have refund under the cited act of May 26, 1926.

The written consent of the plaintiff cited under explanatory note (2) of paragraph 3 of this answer is understood by this defendant, Comptroller General of the United States, to apply to deductions for the item of \$226.67 in reference to which the plaintiff had
13 been addressed by the Secretary of the Navy and also to the checkages of \$440 the plaintiff refers to as then being in process of execution, but, if it shall be determined by the court, the consent is limited to the item of \$226.67, the matter is not one involving any official action of this defendant, Comptroller General of the United States, with respect to the plaintiff's account, the action by this defendant having been only with respect to the official accounts of the responsible disbursing officers and their liability to account for the public funds advanced to them and the action resulting in the deductions in the plaintiff's account having been initiated and executed solely by the responsible disbursing officers in the Navy Department.

The item of \$360 involving the Navy appropriation for the fiscal year 1927, described under explanatory note (4) in paragraph 3 of this answer, is a direct claim for a money judgment against the United States for compensation alleged to be due the plaintiff as an officer of the United States, but not in fact or in law due to the plaintiff, and is not for consideration in this proceeding for a mandatory injunction. *Case v. Terrell*, 11 Wall. 199, 20 L. Ed. 134; *Parkerburg v. Brown*, 106 U. S. 487, 500; *Thompson v. McCarl*, Law No. 73173, in the Supreme Court of the District of Columbia.

The plaintiff having obtained public money to which he was not entitled, and for which he has never manifested, and does not now manifest in his bill of complaint, any inclination to make restitution other than as has been done, in part at least, with his consent and at his written request, through the adjustment of debit and credit items in his open account, and adjustment which the Congress
14 has recognized and validated within limitations in the cited act of May 26, 1926, is not entitled to the aid of a court of equity in obtaining a substantially equivalent sum from the United States Treasury, asserted to be due him as compensation for various periods since January 1, 1923, there being for consideration the plaintiff's entire account, both debits and credits, to determine what he is entitled by law to be paid for any particular period, and also for consideration that claims for certain of the periods would seem to be barred by *laches* in view of the limitation prescribed in section 1265, Code of Law for the District of Columbia.

It is further asserted that this court is without jurisdiction in the instant matter to issue the extraordinary writ of injunction against this defendant, it not appearing to be in aid of any original jurisdiction of this court, nor may injunction be made to serve the function of a writ of error to review the action of the defendant. Section 61 of the Code of Law for the District of Columbia, 31 Stat. 1199; section 262 of the Judicial Code of 1911, 36 Stat. 1162; the *Shade Shop case*, decided by the Supreme Court of the United States April 18, 1927, 274 U. S. 145, 47 S. Ct. Rep. 557; *United States v. Lynch*, 137 U. S. 280-6; *Barber v. Hetfield*, 4 Fed. (2d) 245; *Carroll Electric Company v. McCarl*, 8 Fed. (2d) 910; *Howden v. Shipbuilding Corp.*, 17 Fed. (2d) 530, last par., p. 532; *Work v. Rives*, 267 U. S. 175

(1925); *Louisiana v. McAdoo*, 234 U. S. 627 (1914). *McAllister v. United States*, 141, U. S. 183-184, 35 L. Ed. 693, 696.

This defendant, having fully answered, prays this honorable court to dismiss the bill of complaint filed herein, so far as the same is directed against him, and that he may have his costs of the plaintiff.

J. RAYMOND McCARL,
Comptroller General of the United States, Defendant.

R. L. GOLZÉ,
General Counsel.

H. O. HOAGLAND,
*Attorneys for Comptroller General
of the United States, Defendant.*

15 DISTRICT OF COLUMBIA, ss:

I, J. Raymond McCarl, on oath state that I have read the foregoing answer by me subscribed, and know the contents thereof, and that the matters and things therein set forth I verily believe to be true.

J. RAYMOND McCARL.

Subscribed and sworn before me this 24th day of April, 1929.

[SEAL]

A. R. GARD,
Notary Public.

EXHIBIT A

copy-ved

A-LCB-112

FEBRUARY 2, 1928.

Lieut. WILLIAM ELLIOTT, (SC), *U. S. Navy*,
U. S. S. "Argonne," % Postmaster, New York, N. Y.

SIR: Reference is made to item 7, second quarter, 1927, and item 4, third quarter, 1927, in the case of Chief Pay Clerk Allison A. Brock, U. S. Navy, as shown in your account under certificate No. K-13087-N, dated August 17, 1927.

The rolls for the fourth quarter, 1927, and first quarter, 1928, show that a total of \$560 has been checked against the account of Chief Pay Clerk Brock to cover the items in question, but it has been held by this office in this particular case that, with respect to the reported checkages in the officer's pay account to satisfy disallowances outstanding in the accounts of responsible disbursing officers, recent court decisions make necessary the requirement that before any credit is accorded in a disbursing account by reason of such reported checkages there be filed a certificate subscribed by Brock consenting to such checkages in his pay account, or a certificate from the Secretary of the Navy to the effect that such consent has been orally obtained.

It is requested that a certificate to conform to the above be submitted in order that the items in question may be credited in your account.

For the Comptroller General of the United States.

Respectfully,

(Signed)

F. A. SEAMAN,
Chief of Section.

GEM
EBB

A-WSS-112

copy-ved
JANUARY 4, 1929.

Lieut. N. J. HALPINE (SC), *U. S. Navy,*
U. S. Submarine Base, Pearl Harbor, T. H.

SIR: Receipt is acknowledged of your letter of November 17, 1928, forwarded to this office by the Bureau of Supplies and Accounts December 10, 1928, relative to certificate of settlement No. M-23797-N, dated October 8, 1928, in your disbursing accounts, wherein credit was disallowed in the sum of \$120, covering payment of rental and subsistence allowances for dependent mother in the case of Chief Pay Clerk Allison A. Brock, U. S. Navy, retired.

In view of the fact that Chief Pay Clerk Brock refuses to sign formal consent to the checkage of this amount made in the first quarter, 1928, by Lieut. William Elliott (SC), U. S. Navy, credit may not be allowed in your disbursing accounts.

For the Comptroller General of the United States.

Respectfully,

CHIEF OF SECTION.

Copy to: The Paymaster General of the Navy, Navy Department, Washington, D. C.

mcw

Answer of Charles Francis Adams to the bill of complaint and the rule to show cause

Filed April 25, 1929

* * * * *

The defendant, Charles Francis Adams, for answer to the bill of complaint and the rule to show cause, says:

1. He admits the averments of fact in paragraph 1 of the bill of complaint.
- 17 2. He admits the averments of fact in paragraph 2 of the bill of complaint, except that he has no information as to whether or not accounts of disbursing officers showing payments to the plaintiff were ever passed and certified by the accounting officers of the Government.
3. Answering paragraph 3 of the bill of complaint, he states that he has no knowledge of what amounts have been withheld from plaintiff's pay and allowances nor is this information contained in the files and records of the Navy Department, except that the records of the Navy Department do indicate that the plaintiff consented to checkage of his pay for the amount of \$226.67 on account of payments of increased rental and subsistence allowances for an alleged dependent mother made to plaintiff by Lieutenant William F. Jones, Supply Corps, U. S. Navy, during the first and second quarters, 1924, which payments were subsequently disallowed in that officer's accounts. In further answer to said paragraph 3 he states that on November 14, 1925, following decision of the Court of Appeals of the District of Columbia in the case of *McCarl v. Cox*, decided November 2, 1925, the former Secretary of the Navy, Curtis

D. Wilbur, issued a dispatch to the naval service known as "ALNAV 21," copy of which is attached hereto marked "Exhibit 1," in which he canceled as of October 31, 1925, his previous dispatch known as "ALNAV 24," copy of which is attached hereto marked "Exhibit 2"; by the last sentence of the said "ALNAV 21" a procedure was established whereby officers whose pay had theretofore been withheld and who had not brought action in this court prior to November 11, 1925, were authorized to submit claims for refund to the Navy Department for consideration and transmission to the

18 Comptroller General; the records of the Navy Department, however, disclose that no such claim was ever submitted by plaintiff for refund of amounts which had been withheld from his pay because of his alleged indebtedness to the United States for allowances paid him on account of dependent mother.

4. He states that under an act of Congress approved May 26, 1926 (44 Stat. 654, chap. 397), it is the duty of the Comptroller General to make refund in proper cases of amounts theretofore withheld from the pay of officers of the Navy on account of payments made to them prior to July 1, 1923, of allowances for dependent parents; that the Comptroller General has exclusive jurisdiction under that act to determine whether the facts entitle an officer to refund in any such case; and that this defendant has no knowledge as to what action the Comptroller General may decide to take in regard to the plaintiff's alleged right to refund of amounts theretofore withheld from his pay. He further states that he has no intention of revoking "ALNAV 21" (defendant's Exhibit 1) or of authorizing or permitting the withholding of any future pay or allowances of the plaintiff, without his written consent, to cover the claim set up by the defendant, J. Raymond McCarl. He has no knowledge as to whether or not the plaintiff has complied with the provisions of the act of Congress approved May 26, 1926, referred to in this paragraph, and has no knowledge as to what amount, if any, the plaintiff is entitled to have refunded under that act and for further answer refers to paragraph 3. He further states that, so far as the records of the Navy Department indicate, pay and allowances accruing since October 31, 1925, have been paid to the plaintiff in the usual and ordi-

19 nary manner in which officers of the Navy are paid and that the plaintiff has an adequate and complete remedy at law for the recovery of any sum due him which was withheld from his pay and allowances prior to October 31, 1925, and which has not been or shall not be refunded by the Comptroller General under the act approved May 26, 1926 (44 Stat. 654, chap. 397).

Further answering the bill of complaint he says that he is merely a formal party to this litigation and has no direct interest therein; that since the decision of the Court of Appeals of the District of Columbia in the case of McCarl v. Cox, decided November 2, 1925, he has not withheld or caused to be withheld or threatened to withhold or to cause to be withheld any pay or allowances thereafter accruing to the plaintiff, except as stated in paragraph 3; that the Comptroller General has exclusive jurisdiction under the act approved May 26, 1926 (44 Stat. 654, chap. 397), to refund to the plaintiff any sum which may theretofore have been withheld from the plaintiff's pay and allowances because of the alleged indebtedness to

the United States on account of allowances for dependent wife or mother obtained by the plaintiff prior to July 1, 1923; and that this defendant is without jurisdiction to refund or to cause to be refunded any sum so withheld from the plaintiff's pay and allowances.

Wherefore, having fully answered said bill of complaint and rule to show cause, this defendant prays that said rule be discharged and said bill be dismissed with costs.

C. F. ADAMS.

LEO A. ROVER,

United States Attorney.

REBEKAH S. GREATHOUSE,

Assistant United States Attorney.

Attorneys for Defendant.

20 DISTRICT OF COLUMBIA, ss:

I, Rebekah S. Greathouse, Assistant United States attorney, attorney for defendant, Charles Francis Adams, depose and say that I have read the foregoing answer to the bill of complaint and rule to show cause subscribed to by Charles Francis Adams, know the contents thereof, and that the matters and things therein stated I verily believe to be true.

[SEAL.]

REBEKAH S. GREATHOUSE.

Subscribed and sworn to before me this 24th day of April, 1929.

MILFORD F. SCHWARTZ,

Notary Public, D. C.

Received copy of the foregoing answer this 25 day of April, 1929.

S. T. ANSELL,

Attorney for Plaintiff.

EXHIBIT 1

WASHINGTON, 14 November, 1925.

0214. Twenty-one alnav. Alnav twenty-four and Bureau of Supplies and Accounts circular letter dated September twenty-nine, nineteen twenty-four, are cancelled as of thirty-one October, nineteen twenty-five. The comptroller general has agreed that in all cases in which action has been brought in the Supreme Court of the District of Columbia prior to eleven November, nineteen twenty-five, in connection with withholding of pay because of indebtedness to the United States as certified by the general accounting office because of alleged overpayment of commutation of quarters or rental and

21 subsistence allowance on account of dependents in which a decree has been or would be entered similar to that entered by such court in the Cox case payment will be authorized of the pay of such officers without checkage on account of allowances held to have been wrongfully obtained, including refund of such checkages as have been made on that account and as required by the decree of the court entered in the Cox case. He further agrees that there be no checkage of pay accruing on and after one

November, nineteen twenty-five, even though proceedings may not have been instituted by the officers in the Supreme Court, District of Columbia. In cases of disputed checkage where action has not been brought in the Supreme Court, District of Columbia, prior to eleven November, claims for refund if forwarded to the department accompanied by complete and satisfactory proof of dependency will be considered and forwarded to the Comptroller General for reconsideration with departmental approval if found justified. 1155.

SECRETARY OF THE NAVY.

EXHIBIT 2

[Despatch]

NAVY DEPARTMENT,

Washington, 11th August, 1924.

0211. Twenty-four alnav. The Secretary of the Navy is of the opinion that the holding of the Supreme Court of the United States is decisive that the salary of officers is not subject to offset because of claims of the Government. The Comptroller General holds the contrary view. In order that officers will not be deprived of sufficient funds to meet their current necessities it is hereby directed that no disbursing officers shall withhold more than twenty per cent of any officers current pay without his consent because of alleged over-payments to him of commutation of quarters or rental and sub-

sistence allowances on account of dependents, and furthermore
22 it is directed that in all such cases disbursing officers pay eighty per cent of the pay hereafter accruing or which has been heretofore withheld unless the amount of the alleged total indebtedness has heretofore been withheld. The Comptroller General agrees to allow credit to disbursing officers for payments above directed and further agrees that the acceptance by an officer of less than his monthly pay in such cases shall not be deemed an acquiescence on the part of such officer in the withholding of any of his pay. Inform all officers concerned that they may accept such payments under protest and that the Comptroller General will reopen any case upon request of the officer concerned. Nothing contained herein shall be construed to deny any officer the right to pursue such legal remedies as he may desire or as intending to afford any officer an opportunity to secure in any way an unjust advantage over the Government. 1620.

SECRETARY OF THE NAVY.

Motion to strike out defendants' answers

Filed April 29, 1929

* * * * *

Now comes the plaintiff, by his attorneys, and moves the court to strike out the answers of the defendants to the bill of complaint herein filed and to award plaintiff a decree pro confesso, for the following reasons:

1. The said answers, both and each, are insufficient in law.
2. The said answers do not raise any issue of fact.

3. Under the admitted facts the said defendants were and are without authority to withhold or to cause the withholding of plaintiff's pay.

S. T. ANSELL,
E. S. BAILEY,
GEO. M. WILMETH,
Attorneys for Plaintiff.

23 The UNITED STATES DISTRICT ATTORNEY:

Please take notice that the above motion will be set down for hearing at 10 a. m. May 10, 1929, or as soon thereafter as counsel can be heard.

S. T. ANSELL,
Attorney for Plaintiff.

APRIL 29, 1929.

Final Decree

Filed June 28, 1929

* * * * *

This cause came on to be heard at this term upon the motion of plaintiff to strike out the answers to the plaintiff's bill of complaint filed by the defendants, and the parties hereto, by their respective counsel, having stipulated in open court that the cause be heard as upon plaintiff's bill of complaint and the answers thereto of the defendants J. Raymond McCarl, Comptroller General of the United States, and Charles Francis Adams, Secretary of the Navy, and that a final decree be taken at this time, and the cause having been so heard, it is by the court, this the 28th day of June, 1929, adjudged, ordered, and decreed that—

So much of the bill of complaint as relates to the items of pay and allowances aggregating \$393.52 shown by the answer of the defendant J. Raymond McCarl, Comptroller General of the United States, to have been "collected * * * by stoppage" for dependent mother allowance payments to the plaintiff, "obtained * * * prior to July 1, 1923." is dismissed by reason of the provisions of the act of May 26, 1926, 44 Stat. 654.

The defendants, J. Raymond McCarl, Comptroller General of the United States, and Charles Francis Adams, Secretary of the Navy, be and they and each of them are hereby, restrained and enjoined from any and all interference with any disbursing officer of the Navy, to prevent the payment to the plaintiff of the sum of \$906.67 withheld from his pay and allowances now due and unpaid to him on account of his pay and allowances as a chief pay clerk, U. S. Navy (retired), and from withholding or causing the withholding of any part of plaintiff's pay and allowances for the purpose of liquidating the disputed claim of \$906.67 as arising on account of alleged overpayments to the plaintiff of dependency allowances as mentioned in said bill of complaint; and that said defendant Charles Francis Adams, Secretary of the Navy, be and hereby is enjoined and commanded to cause to be paid and to pay to the plaintiff the said sum of \$906.67 withheld from plaintiff's pay and allow-

ances by reason of the ruling of the defendant J. Raymond McCarl, Comptroller General of the United States, and the action of the Navy Department and its disbursing officers, and to continue to pay and cause to be paid to the plaintiff his regular pay and allowances in the usual and customary manner in which officers of the Navy are paid, notwithstanding any disputed claim of overpayments of dependency allowances as mentioned in said bill of complaint.

And the costs shall be taxed by the clerk of the court.

By the court:

PEYTON GORDON, *Justice*.

24 Objected to as to form because the appropriation under which payment is to made is not found and decided. Article I, section 9, of the Constitution provides that no money shall be drawn from the Treasury but in consequence of appropriations made by law.

LEO A. ROVER,

United States Attorney.

REBEKAH S. GREATHOUSE,

Assistant United States Attorney.

R. L. GOLZE,

H. O. HOAGLAND,

Attorneys for Defendants.

From that portion of the foregoing decree directing payment to the plaintiff of \$906.67 the defendants, in open court, note an appeal to the Court of Appeals of the District of Columbia.

PEYTON GORDON, *Justice*.

25

Assignment of errors

Filed August 29, 1929

* * * * *

Now come the defendants, J. Raymond McCarl, Comptroller General of the United States, and Charles Francis Adams, Secretary of the Navy, by their attorneys, and assign for error that the court erred—

2. In holding that the defendants, or either of them, may be compelled to pay to the plaintiff the portion of the pay and allowances withheld from the plaintiff by checkage in his account in accordance with plaintiff's written consent.

2. In holding that the defendants, or either of them may be compelled to pay to the plaintiff as pay and allowances withheld an item of \$360, of which both payment and collection were effected by credit and debit in the plaintiff's open account during the fiscal year 1927, commencing July 1, 1926, and ending June 30, 1927, payment of which item had been determined not to be authorized by law and to be over and above the pay and allowances authorized for the plaintiff in the appropriations for that fiscal year.

3. In not holding that the written consent of the plaintiff dated August 6, 1927, to the withholding by checkage of his pay and al-

lowance in the amount of \$226.67, to cover overpayments of dependency allowances paid to him between July 1, 1923, and December 20, 1923, and his long acquiescence therein operated to ratify the withholding of the same.

4. In not holding that the sole remedy of the plaintiff is an action against the United States in the Court of Claims to recover the \$360, claimed to be due the plaintiff as pay and allowances for the fiscal year 1927, commencing July 1, 1926, and ending June 30, 1927, but payment of which had been determined to be unauthorized and to be over and above the pay and allowances authorized for the plaintiff in the appropriations for the fiscal year 1927.

LEO A. ROVER,
United States Attorney.

REBEKAH GREATHOUSE,
Assistant United States Attorney.

R. L. GOLZÉ,
H. O. HOAGLAND,
Attorneys for the Defendants.

SAMUEL T. ANSELL,
EDWARD S. BAILEY,
GEORGE M. WILMETH,
Attorneys for the Plaintiff.

Please take notice that we are this 29th day of August, 1929, filing the foregoing assignment of errors.

LEO A. ROVER,
United States Attorney.
REBEKAH GREATHOUSE,
Assistant United States Attorney.
R. L. GOLZÉ,
H. O. HOAGLAND,
Attorneys for the Defendants.

Designation of record

Filed July 15, 1929

* * * * *

The clerk will please prepare a transcript of the record in the above-entitled cause, on appeal to the Court of Appeals of the District of Columbia, and include therein the following:

1. The bill of complaint.
2. Separate answer of J. Raymond McCarl, Comptroller General of the United States, to the bill of complaint and Exhibits A and B thereto attached.
3. Separate answer of the defendant, Charles Francis Adams, Secretary of the Navy, and Exhibits 1 and 2 thereto attached.
4. Motion of the plaintiff to strike out defendant's answers.
5. Final decree entered by the court June 28, 1929, the objection noted thereon by the defendants to the form of the decree, and the indorsement thereon showing an appeal noted in open court on behalf

of the defendants, Comptroller General of the United States and Secretary of the Navy.

6. Assignment of errors.

7. This designation of record.

LEO A. ROVER,

United States Attorney.

REBEKAH GREATHOUSE,

Assistant United States Attorney.

R. L. GOLZÉ,

H. O. HOAGLAND,

Attorneys for the Defendants.

We acknowledge service of the foregoing designation of record and receipt of a copy thereof this 15th day of July, 1929.

S. T. ANSELL,

E. S. BAILEY,

G. M. WILMETH,

Attorneys for the Plaintiff.

Per A. P. U.

29

Supreme Court of the District of Columbia

UNITED STATES OF AMERICA,

District of Columbia, ss:

I, Frank E. Cunningham, clerk of the Supreme Court of the District of Columbia, hereby certify the foregoing pages numbered from 1 to 28, both inclusive, to be a true and correct transcript of the record, according to directions of counsel herein filed, copy of which is made part of this transcript, in cause No. 49630, Equity, wherein Allison A. Brock is plaintiff and J. Raymond McCarl, Comptroller General, et al., are defendants, as the same remains upon the files and of record in said court.

In testimony whereof I hereunto subscribe my name and affix the seal of said court at the city of Washington, in said District, this 30th day of August, 1929.

[SEAL.]

FRANK E. CUNNINGHAM,

Clerk.

By CHAS. B. COFLIN,

Assistant Clerk.

(Indorsed on cover:) District of Columbia, Supreme Court. No. 5038. J. Raymond McCarl, Comptroller General, etc., Appellants, vs. Allison A. Brock. Court of Appeals, District of Columbia. Filed Aug. 30, 1929. Henry W. Hodges, Clerk.

COURT OF APPEALS
DISTRICT OF COLUMBIA
FILED

NOV 8 - 1929

Henry W. Hodges
2100

No. 5038

In the Court of Appeals of the District
of Columbia

APRIL TERM, 1929

J. RAYMOND MCCARL, COMPTROLLER GENERAL, AND
CHARLES FRANCIS ADAMS, SECRETARY OF THE
NAVY, APPELLANTS

v.

ALLISON A. BROCK, APPELLEE

BRIEF FOR APPELLANTS

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In the Court of Appeals of the District of Columbia

APRIL TERM, 1929

No. 5038

J. RAYMOND MCCARL, COMPTROLLER GENERAL, AND
Charles Francis Adams, Secretary of the Navy,
appellants

v.

ALLISON A. BROCK, APPELLEE

BRIEF FOR APPELLANTS

STATEMENT OF THE CASE

This is an appeal from that part of a final decree granting an injunction, entered in the Supreme Court of the District of Columbia June 28, 1929, restraining the appellants from interfering with the payment of \$226.67 withheld from the appellee's pay and allowances in accordance with the appellee's written consent of August 6, 1927, and from interfering with the payment to the appellee of \$360 as pay and allowances for the fiscal year 1927 (July 1, 1926-June 30, 1927), alleged by the appellee to have been improperly withheld, and directing the

appellant, Secretary of the Navy, to cause to be paid and to pay to the appellee the said amounts as a part of the sum of \$906.67 so directed in the decree to be paid. (R. 5, 6, 7, 8.)

The appellee, Allison A. Brock, a chief pay clerk, retired, United States Navy, filed his bill of complaint April 2, 1929, on the equity side of the Supreme Court of the District of Columbia, against the appellants, J. Raymond McCarl, Comptroller General, and Charles Francis Adams, Secretary of the Navy (R. 1), setting forth, in so far as is material to this appeal, that as such chief pay clerk, retired, United States Navy, "he has been and is entitled by law to be paid certain pay and allowances provided by acts of Congress," but that by reason of rulings by the appellant, Comptroller General of the United States, that certain payments of allowances on account of dependents which had been made to the appellee were unauthorized, and by reason that "the then Secretary of the Navy or his subordinates in the Navy thereto authorized ordered that the pay of plaintiff be thereafter checked, stopped, and withheld to make good the said payments," there had been checked and withheld from the appellee's pay \$1,300.19 from 1923 to 1928; setting forth, further, that the appellee denied any liability on account of the unauthorized payments made to him, was entitled to receive his full pay and allowances as provided by Congress, and that the withholding of such pay and allowances constituted an unlawful invasion of the appellee's rights and

worked irreparable injury entitling him to relief in a court of equity; wherefore he prayed that the appellant, Comptroller General of the United States, and the appellant, Secretary of the Navy, be enjoined and restrained from any interference to prevent payment to the appellee of the said sum of \$1,300.19 and that the appellant, Secretary of the Navy, be enjoined and commanded to cause to be paid to the appellee the said sum of \$1,300.19 (R. 1-3).

The appellant, Secretary of the Navy, like the appellee, had not access to the original records on file in the General Accounting Office, and disclaimed knowledge of the facts concerning the withholding of the appellee's pay and allowances as a chief pay clerk, retired, United States Navy, except as was set forth in paragraph 3 of the separate answer of the appellant, Secretary of the Navy, filed April 25, 1929, that the records of the Navy Department indicated the appellee had "consented to checkage of his pay for the amount of \$226.67 on account of payments of increased rental and subsistence allowances for an alleged dependent mother made to plaintiff by Lieutenant William F. Jones, Supply Corps, U. S. Navy, during the first and second quarters, 1924, which payments were subsequently disallowed in that officer's accounts" (R. 10); and that the records further indicated that the appellee had not submitted any claim for the pay and allowances so withheld (R. 11); further, as set forth in paragraph 3 of the answer, that by "ALNAV

21'' issued as a dispatch to the naval service (R. 11) and attached to the answer as Exhibit 1 (R. 12-13) there had been canceled as of October 31, 1925, the dispatch "ALNAV 24" attached to the answer as Exhibit 2 (R. 13), "ALNAV 21" (R. 12-13) reciting succinctly the agreement made between the appellant, Comptroller General of the United States, and the appellant, Secretary of the Navy, to terminate the practice of withholding a Navy officer's statutory pay and allowances, held unauthorized by this court November 2, 1925, in *McCarl et al. v. Cox*, 8 Fed. (2d) 669, and directing that no such withholding (checkage), should be made of pay accruing to an officer on and after November 1, 1925; in paragraph 4 of the answer, moreover, that the appellant, Secretary of the Navy, had not authorized and did not intend to authorize checkage of the appellee's pay and allowances, since the decision of this court on November 2, 1925, except of the \$226.67 withheld pursuant to the appellee's written consent. The appellant, Secretary of the Navy, also, in paragraph 4 of his answer, directs attention to the controlling provisions of the act of May 26, 1926, 44 Stat. 654, and points out that under that statute the amounts which had been withheld from the appellee's pay and allowances, as alleged in the bill of complaint, because of dependent allowance payments obtained by the appellee prior to July 1, 1923, could be paid only on a claim presented to the appellant, Comptroller

General of the United States, showing a compliance by the appellee with the provisions or conditions fixed in said statute; that the appellant, Comptroller General of the United States, is vested by said statute with exclusive jurisdiction to consider the appellee's right to have payment made to him as claimed; and that the appellant, Secretary of the Navy, has no knowledge as to whether the appellee has complied with the provisions of the act or what amount, if any, the appellee is entitled to be paid thereunder; and that, by reason of the provisions of the cited act of May 26, 1926, the Secretary of the Navy has no legal duty or authority to pay or to cause to be paid to the appellee any sum withheld from the appellee's pay and allowances on account of allowances for dependent wife or mother obtained by the appellee prior to July 1, 1923. The appellant, Secretary of the Navy, prayed dismissal of the bill of complaint on these grounds. (R. 11-12.)

The appellant, Comptroller General of the United States, filed a separate answer to the bill of complaint April 25, 1929, and, having control of and access to the original records on file in the General Accounting Office, recited in such separate answer the actual facts, as shown in the official records, concerning the manner of withholding and the amount withheld of appellee's pay and allowances and prayed that, in so far as directed against him, the bill of complaint be dismissed. (R. 3-9.)

A motion to strike out the appellant's answers was filed by the appellee April 29, 1929 (R. 13-14), but at the hearing of the motion the respective counsel stipulated in open court that the cause then should be heard as at final hearing on the bill of the appellee and answers thereto of the appellants; after argument the several parties stood on their respective pleadings and the final decree was taken thereon (R. 14).

In this situation of the record the material facts as shown in the official records on file in the General Accounting Office and stated in the separate answer of the appellant, Comptroller General of the United States, are not in dispute. (R. 3-9.)

The facts thus established are that the appellee obtained payments of dependent allowances under the act of April 16, 1918, 40 Stat. 530, and the act of June 10, 1922, 42 Stat. 627, 628, for the period September 14, 1921, to March 31, 1927, without establishing that he had a dependent as defined in the cited statutes; accordingly, in the settlement and adjustment of the disbursing accounts of the disbursing officers responsible for making such unauthorized payments to the appellee, credits for the payments were disallowed, there being no appropriations available against which the unauthorized payments were authorized to be charged. The disbursing officers, thus having become liable to have their own pay and allowances stopped entirely, pursuant to the requirement in section 1766, Re-

vised Statutes, and having become liable, with their respective sureties, to be sued under section 3624, Revised Statutes, for the unauthorized payments made to the appellee, for the purpose of obtaining credit in their several disbursing accounts, reported collection from the appellee of \$1,300.19 through debit adjustments in the appellee's pay and allowance account, which debit adjustments were accomplished, in part, at the appellee's suggestion and with his written consent. (R. 4-5.) The debit and credit adjustments involved in the said unauthorized payments and the alleged unauthorized withholding of pay and allowances were initiated and executed solely at the instance of the responsible disbursing officers except the item of \$226.67 designated in the answer of the appellant, Secretary of the Navy, as checked with appellee's written consent, and were made, and affected fiscal year appropriations, during the periods designated in the following statement (R. 4, 5, 6, 7, 8):

A

CREDITED (OVERPAID)	DEBITED (WITHHELD PAY AND ALLOWANCES)
September 14, 1921, to March 8, 1922 (by J. H. Theis)----- \$213.52	January 1, 1923, to February 10, 1923 (by A. B. McKay)----- \$213.52
February 11, 1923, to June 30, 1923 (by W. F. Jones)----- 186.67	July 1, 1925, to October 31, 1925 (by B. Berkowitz)----- 180.00

B

July 1, 1923, to December 20, 1923 (by W. F. Jones)----- 226.67	July 1, 1927, to September 30, 1927 (by W. Elliott)----- 226.67
---	---

C

November 1, 1925, to January 31, 1926 (by N. J. Halpine)-----	120.00	July 1, 1927, to Septem- ber 30, 1927 (by W. Elliott)-----	120.00
February 1, 1926, to June 30, 1926 (by W. Elliott)-----	200.00	July 1, 1926, to Septem- ber 30, 1926 (by W. Elliott)-----	200.00

D

February 1, 1926, to June 30, 1926 (dupli- cate credit and pay- ment by W. Elliott)---	200.00	April 1, 1927, to June 30, 1927 (by W. Elliott)-----	200.00
---	--------	--	--------

E

July 1, 1926, to March 31, 1927 (by W. Elliott)-----	360.00	April 1, 1927, to June 30, 1927 (by W. Elliott)-----	360.00
Total credits-----	1,506.86	Total debits-----	1,500.19

Sections A, C, and D of the statement are not involved in this appeal for reasons as follows:

Section A shows \$393.52 (\$213.52 plus \$180.00) "collected * * * by stoppage of pay" for payments of dependent allowances aggregating \$400.19 (\$213.52 plus \$186.67) "obtained * * * prior to July 1, 1923," by the appellee and the court below dismissed so much of the bill of complaint as related to these items aggregating \$393.52 "by reason of the provisions of the act of May 26, 1926, 44 Stat. 654." No appeal was noted as to this sum. (R. 5, 7, 14.)

Section C shows credits or overpayments aggregating \$320 (\$120 and \$200) made during and from appropriations for the fiscal year ending June 30, 1926, debited or withheld from pay and allowances accruing under appropriations for the fiscal years ending June 30, 1927 (\$200), and June 30, 1928

(\$120). The appellants now regard the case of *McCarl et al. v. Cox* to be controlling of this \$320 item and as to it no appeal was noted from the order of the court below directing it to be paid as a part of \$906.67 directed therein to be paid. (R. 5, 14, 15.)

Section D shows a duplicate \$200 credit or payment made during the fiscal year ending June 30, 1926, and debited or withheld during fiscal year ending June 30, 1927, which item the appellee did not claim in his bill of complaint and which was not included in the \$906.67 directed by the court below to be paid. (R. 5, 14, 15.)

Sections B and E of the statement showing items of \$226.67 and \$360, respectively, which, with the two items aggregating \$320 shown under section C of the statement, aggregate the \$906.67 directed by the court below to be paid to the appellee, are involved in the appeal, and the facts which, on the record, must be accepted as established as to them are as follows:

The item of \$226.67 shown under section B was credited or paid to the appellee for the period July 1, 1923, to December 20, 1923, by paymaster W. F. Jones, involving the Navy appropriations for the fiscal year 1924, commencing July 1, 1923, and ending June 30, 1924, and was debited or withheld during the quarterly accounting period July 1, 1927, to September 30, 1927, involving the Navy appropriations for the fiscal year 1928, commencing July 1, 1927, and ending June 30, 1928 (R. 4-5), the action being based on official writings as follows (R. 5-6):

Letter of the appellant, Secretary of the Navy, to the appellee of July 11, 1927:

2. * * * the department considers that you should promptly refund the sum of \$226.67, the amount disallowed in the accounts of Lieutenant Jones, Supply Corps, by reason of increased allowances paid to you on the ground which you failed satisfactorily to substantiate and which you have since rejected in favor of a totally different ground.

3. You will endorse hereon, with a prompt return of papers, your intentions relative to refunding the above sum of \$226.67, for which sum the department considers, for the reasons above stated, you are justly indebted to the Government.

An endorsement was placed on this letter by the appellee August 6, 1927, approximately 20 months previous to the filing of his bill of complaint in the court below, on April 2, 1929 (R. 1, 5, 6), *agreeing to make refund* of the \$226.67 item as follows:

3. I am willing for checkage to be made; however, I do not acknowledge that I was not entitled to the credit.

The appellant, Comptroller General of the United States, in accordance with the opinion of the Supreme Court of the District of Columbia (Hoehling, J.) in the case of *Harant v. McCarl*, Equity No. 47038, of November 22, 1927, holding that where an officer has consented as well as requested in writing that collection from him be

made through deductions from his pay injunctive relief is not authorized, accepted the appellee's designation of the manner in which he was willing to make refund, viz., by checkage of his pay and allowances, as adequate authority for such checkage and allowed credit in the disbursing account of the responsible disbursing officer for the \$226.67 so collected (R. 6); the appellant, Comptroller General of the United States, refused, however, to allow credit in the disbursing accounts of W. Elliott and N. J. Halpine for deductions made on their behalf from the appellee's pay and allowances without his written consent, such manner of collection having been held unauthorized in *McCarl v. Cox*, 8 Fed. (2d) 669 (R. 6, 9, 10).

Section E of the statement shows the offsetting debit and credit adjustments of \$360 made in the appellee's account during the fiscal year 1927, commencing July 1, 1926, and ending June 30, 1927, which, it is established on the record (R. 6, 8), neither increased nor diminished the statutory pay and allowances authorized to be paid to the appellee from Navy appropriations of that fiscal year and did not operate as a checkage or withholding of such statutory pay and allowances, but (R. 4) represented rather an improper credit, with offsetting debit, of pay and allowances for the fiscal year 1927, over and above the pay and allowances authorized for the appellee by acts of Congress and in excess of what appropriations made by the Congress for that fiscal year were available to pay.

Notwithstanding these facts and the insistence of the appellants, Secretary of the Navy and Comptroller General of the United States, in their respective answers cited, and in detailed argument by counsel, at the hearing of the cause, that *McCarl v. Cox*, 8 Fed. (2d) 669, and similar cases, do not control that part of the appellee's claim set out in his bill of complaint involving his written consent and request for the item of \$226.67 shown in section C of statement, to be checked from his pay and allowances, and involving the offsetting credit and debit adjustment during the fiscal year 1927, of the \$360 item shown in section E of the statement, which did not diminish or effect a withholding of appellee's statutory pay and allowances for which an appropriation was available during that fiscal year, commencing July 1, 1926, and ending June 30, 1927, the court below included those two items in the \$906.67 directed, by the mandatory part of the final decree for injunction, entered June 28, 1929, to be paid to the appellee by the appellant, Secretary of the Navy; the court below, moreover, refused to accord any consideration to the fact that there being no appropriation from which the \$360 is authorized to be paid, the appellant, Secretary of the Navy, is without power to comply with that portion of the decree. The appellants, accordingly, in open court, noted an appeal from these objectionable portions of the decree on the date decree was entered, June 28, 1929. (R. 14, 15.)

ASSIGNMENT OF ERROR

The court erred:

1. In holding that the defendants, or either of them, may be compelled to pay to the plaintiff the portion of the pay and allowances withheld from the plaintiff by checkage in his account in accordance with plaintiff's written consent.

2. In holding that the defendants, or either of them, may be compelled to pay to the plaintiff as pay and allowances withheld an item of \$360, of which both payment and collection were effected by credit and debit in the plaintiff's open account during the fiscal year 1927, commencing July 1, 1926, and ending June 30, 1927, payment of which item had been determined not to be authorized by law and to be over and above the pay and allowances authorized for the plaintiff in the appropriations for that fiscal year.

3. In not holding that the written consent of the plaintiff dated August 6, 1927, to the withholding by checkage of his pay and allowances in the amount of \$226.67, to cover overpayments of dependency allowances paid to him between July 1, 1923, and December 20, 1923, and his long acquiescence therein operated to ratify the withholding of the same.

4. In not holding that the sole remedy of the plaintiff is an action against the United States in the Court of Claims to recover the \$360, claimed to be due the plaintiff as pay and allowances for

the fiscal year 1927, commencing July 1, 1926, and ending June 30, 1927, but payment of which had been determined to be unauthorized and to be over and above the pay and allowances authorized for the plaintiff in the appropriations for the fiscal year 1927.

POINTS

While the appellants have assigned four errors committed by the court below, for purposes of argument, they are considered under the following points:

An officer of the Navy who denies liability for an overpayment of \$226.67 made to him as pay and allowances by a Navy disbursing officer between July 1, 1923, and December 20, 1923, but who, nevertheless, on being asked by the Secretary of the Navy whether he would make refund, consented in writing to do so by having his authorized pay and allowances for a subsequent fiscal year checked in that amount, is not entitled, on a bill of complaint filed on the equity side of the Supreme Court of the District of Columbia approximately 20 months after the date of such written consent and after credit has been allowed in the official account of the responsible disbursing officer, to a decree for mandatory injunction directing payment to him by the Secretary of the Navy of the amount so checked and applied.

An officer of the Navy who has received his full statutory pay and allowances from the Navy ap-

appropriations for the fiscal year commencing July 1, 1926, and ending June 30, 1927, is not entitled, on a bill of complaint filed on the equity side of the Supreme Court of the District of Columbia, to a decree for mandatory injunction against the Comptroller General of the United States and the Secretary of the Navy directing the Secretary of the Navy to pay or cause to be paid an additional \$360 for pay and allowances alleged to be due the officer for the said fiscal year but payment of which had been determined by competent authority to be unauthorized and to be over and above the pay and allowances authorized for the officer under the general statutes and the Navy appropriations for that fiscal year.

ARGUMENT

THE CONSTITUTION

No money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law; and a regular Statement and Account of the Receipts and Expenditures of all Public Money shall be published from time to time. (Article 1, section 9, clause 7.)

THE STATUTES

The act making appropriations for the Navy Department and the naval service for the fiscal year ending June 30, 1927, approved May 21, 1926, 44 Stat. 591, 603-604, appropriates for "Pay of the Navy," as follows:

For pay and allowances prescribed by law of officers on sea duty and other duty, and

officers on waiting orders—pay, \$26,818,377; rental allowance, \$5,463,032; subsistence allowance, \$3,422,573; in all, \$35,703,982; officers on the retired list \$4,314,900; * * * in all, \$119,863,500, of which sum \$500,000 shall be available immediately; *and the money herein specifically appropriated for "Pay of the Navy," shall be disbursed and accounted for in accordance with existing law as "Pay of the Navy," and for that purpose shall constitute one fund.* (Italics supplied to emphasize authority thus given Navy Department to use entire \$119,863,500 as one appropriation available for payment of obligations arising on account of any of the items enumerated under the various subheads but the total not to be exceeded; explained 22 Comp. Dec. 461.)

The power of the Comptroller General of the United States and the Secretary of the Navy to determine what obligations are payable from Navy appropriations and to control the expenditure thereof is derived from statutes as follows:

All money appropriated for the use of the War and Navy Departments shall be drawn from the Treasury, by warrants of the Secretary of the Treasury, upon the requisitions of the Secretaries of those departments, respectively, countersigned and registered in the General Accounting Office. (Section 3673, Revised Statutes, as amended by section 304 of the act of June 10, 1921, 42 Stat. 24, vesting in the General Accounting Office the duties theretofore imposed upon the

“Second Comptroller of the Treasury” and the “Auditor.”)

All appropriations for specific, general, and contingent expenses of the Navy Department shall be under the control and expended by the directions of the Secretary of the Navy, and the appropriation for each bureau shall be kept separate in the Treasury. (Section 3676, Revised Statutes.)

All sums appropriated for the various branches of expenditure in the public service shall be applied solely to the objects for which they are respectively made, and for no others. (Section 3678, Revised Statutes.)

All balances of appropriations contained in the annual appropriation bills and made specifically for the service of any fiscal year, and remaining unexpended at the expiration of such fiscal year, shall only be applied to the payment of expenses properly incurred during that year, or to the fulfillment of contracts properly made within that year; and balances not needed for such purposes shall be carried to the surplus fund [unexpended balances of appropriations for Pay of the Navy, by section 5, act June 20, 1874, 18 Stat. 110, continue available for *such purposes* until otherwise ordered by Congress]. This section, however, shall not apply to appropriations known as permanent or indefinite appropriations. (Section 3690, Revised Statutes.)

SEC. 1. * * * the Secretary of the Navy be, and he is hereby, authorized to is-

sue his requisitions for advances to disbursing officers and agents of the Navy under a "General account of advances," not to exceed the total appropriation for the Navy, the amount so advanced to be exclusively used to pay current obligations on proper vouchers and that "*Pay of the Navy*" shall hereafter be used only for its legitimate purpose as provided by law. (Act June 19, 1878, 20 Stat. 167. Italics supplied.)

SEC. 2. * * * the amount so advanced [shall] be charged to the proper appropriations, and returned to "General account of advances" by pay and counter warrant; the said charge, however, to particular appropriations, shall be limited to the amount appropriated to each. (Act June 19, 1878, 20 Stat. 167.)

SEC. 3. * * * the General Accounting Office shall declare the sums due from the several special appropriations upon complete vouchers, as heretofore, according to law; and shall adjust the said liabilities with the "General account of advances." (Act June 19, 1878, 20 Stat. 167, as amended by sec. 304, act June 10, 1921, 42 Stat. 24.)

There is created an establishment of the Government to be known as the General Accounting Office, which shall be independent of the executive departments and under the control and direction of the Comptroller General of the United States. (Section 301, act June 10, 1921, 42 Stat. 23.)

SEC. 305. Section 236 of the Revised Statutes is amended to read as follows:

“SEC. 236. All claims and demands whatever by the Government of the United States or against it, and all accounts whatever in which the Government of the United States is concerned, either as debtor or creditor, shall be settled and adjusted in the General Accounting Office.” (Act June 10, 1921, 42 Stat. 24.)

Fourth. The General Accounting Office shall receive and examine all accounts of salaries and incidental expenses of the office of the Secretary of the Navy, and of all bureaus and offices under his direction, all accounts relating to the Naval Establishment, Marine Corps, Naval Academy, and to all other business within the jurisdiction of the Department of the Navy, and certify the balances arising thereon to the Division of Bookkeeping and Warrants, and send forthwith a copy of each certificate to the Secretary of the Navy. (Section 7, act July 31, 1894, 28 Stat. 207, as amended by section 304, act June 10, 1921, 42 Stat. 24.)

All powers and duties now conferred or imposed by law upon the Comptroller of the Treasury or the six auditors of the Treasury Department, and the duties of the Division of Bookkeeping and Warrants of the Office of the Secretary of the Treasury relating to keeping the personal ledger accounts of disbursing and collecting officers, shall, so far as not inconsistent with this act, be vested in and imposed upon the General Accounting Office and be exercised without

direction from any other officer. The balances certified by the Comptroller General shall be final and conclusive upon the executive branch of the Government. * * *

(Section 304, act June 10, 1921, 42 Stat. 24.)

The Supreme Court of the District of Columbia is expressly denied by statute any jurisdiction over a claim of an officer of the United States Navy for pay and allowances over and above the pay and allowances which the accounting and administrative officers have determined to be due him under the controlling general statutes and the available appropriations, original jurisdiction over claims of that character, in so far as the judicial branch of the Government is concerned, having been vested exclusively in the United States Court of Claims since the amendment of section 2 of the Tucker Act of March 3, 1887, 24 Stat. 505, by section 2 of the act of June 27, 1898, 30 Stat. 495, as follows:

* * * section two of the Act aforesaid, approved March third, eighteen hundred and eighty-seven, be, and the same is hereby, amended by adding thereto at the end thereof the following: "The jurisdiction hereby conferred upon the said circuit and district courts *shall not extend to cases brought to recover fees, salary, or compensation for official services of officers of the United States or brought for such purpose by persons claiming as such officers or as assignees or legal representatives thereof.*" (Italics supplied.)

Irrespective of whether the Supreme Court of the District of Columbia has jurisdiction to consider the claim of a Navy officer for pay and allowances, payment of which claim the accounting and administrative officers of the United States have found not to be authorized under controlling general statutes or from existing appropriations, the claim involving as it does a mixed question of law and facts and being, in essence, a claim or suit against the United States, the Supreme Court of the District of Columbia is without power to direct, by a final decree for mandatory injunction, that the Secretary of the Navy pay or cause such claim to be paid, but must take judicial notice of the manner in which such claims are required to be paid under the following statutes:

* * * hereafter in all cases of final judgments and awards rendered against the United States by the Court of Claims, and of final judgments rendered against the United States by the circuit and district courts of the United States, payment thereof under appropriations made by Congress shall be made on settlements by the General Accounting Office. (Section 1, act February 18, 1904, 33 Stat. 41; as amended by section 304, act June 10, 1921, 42 Stat. 24.)

The Comptroller General may provide for the payment of accounts or claims adjusted and settled in the General Accounting Office through disbursing officers of the several departments and establishments instead of by

warrant. (Section 307, act June 10, 1921, 42 Stat. 25.)

* * * when any final judgment recovered against the United States or other claim duly allowed by legal authority, shall be presented to the Secretary of the Treasury for payment, and the plaintiff or claimant therein shall be indebted to the United States in any manner, whether as principal or, surety, it shall be the duty of the Secretary to withhold payment of an amount of such judgment or claim equal to the debt thus due to the United States; and if such plaintiff or claimant assents to such set-off, and discharges his judgment or an amount thereof equal to said debt or claim, the Secretary shall execute a discharge of the debt due from the plaintiff to the United States. But if such plaintiff, or claimant, denies his indebtedness to the United States, or refuses to consent to the set-off, then the Secretary shall withhold payment of such further amount of such judgment, or claim, as in his opinion will be sufficient to cover all legal charges and costs in prosecuting the debt of the United States to final judgment. And if such debt is not already in suit, it shall be the duty of the Secretary to cause legal proceedings to be immediately commenced to enforce the same, and to cause the same to be prosecuted to final judgment with all reasonable dispatch. And if in such action judgment shall be rendered against the United States, or the amount recovered for debt, and costs shall be less than the amount so with-

held as before provided, the balance shall then be paid over to such plaintiff by such Secretary with six per cent interest thereon for the time it has been withheld from the plaintiff. (Act March 3, 1875, 18 Stat. 481.)

AUTHORITIES

I

An officer of the Navy who denies liability for an overpayment of \$226.67 made to him as pay and allowances by a Navy disbursing officer between July 1, 1923, and December 20, 1923, but who, nevertheless, on being asked by the Secretary of the Navy whether he would make refund, consented in writing to do so by having his authorized pay and allowances for a subsequent fiscal year checked in that amount, is not entitled, on a bill of complaint filed on the equity side of the Supreme Court of the District of Columbia approximately 20 months after the date of such written consent and after credit has been allowed in the official account of the responsible disbursing officer, to a decree for mandatory injunction directing payment to him by the Secretary of the Navy of the amount so checked and applied.

The case of *McCarl et al. v. Cox*, 8 F. (2d) 669, is understood to have proceeded on the principle that where the statutes fix a Navy officer's pay and allowances and direct the payment, and the fact that a man is an officer and the amount of his pay and allowances have been determined and settled by the

Government accounting and disbursing officers, there is nothing left for them to decide and, in the absence of any express authority, the accounting and disbursing officers may not withhold in whole or in part such pay and allowances as a set-off against overpayments of pay and allowances found by the accounting officers previously to have been made to the officer, which the officer insists were properly made.

Except for the written endorsement of the appellee of August 6, 1927, that he was "willing for checkage to be made" of the \$226.67 paid to him by Lieutenant Jones on a ground which appellee had "failed satisfactorily to substantiate" and which after receiving payment, appellee "rejected in favor of a totally different ground" (R. 5-6), *McCarl et al. v. Cox*, would control this item just as it controls the items of \$120 and \$200 shown in section C of the above statement. It is this written agreement to make refund by having "checkage" made of his pay and allowances which takes this \$226.67 item of the appellee's claim entirely out of the principle applied in *McCarl et al. v. Cox*.

The action of the appellants with respect to the disbursing accounts of the accountable officers who made improper payments of pay and allowances to the appellee not only was authorized but was required of the appellants by cited statutory laws. The appellant, Secretary of the Navy, upon Lieutenant Jones having been found in arrears in his

accounts for the \$226.67 paid to the appellee, was confronted with the requirement in section 1766, Revised Statutes, prohibiting the payment of any money to an accountable officer for his compensation who is in arrears to the United States, and necessarily was cognizant, too, of the liability of Lieutenant Jones, together with his surety, to be sued for the item in accordance with the provisions of sections 1, 2, 3, and 4, act of March 3, 1797, 1 Stat. 512, now in effect as sections 3624, 886, 957, and 951, Revised Statutes, respectively. The appellee had himself abandoned the basis of his claim on which payment originally had been made to him, *in reliance on his good faith*, and was attempting on a different basis to justify retention of the payment he had received. The situation seemed clearly one in which the appellee in equity and good conscience should not retain the money paid him but should make refund of the \$226.67 item for credit in Lieutenant Jones' disbursing account; which refund, made under those circumstances, would not preclude appellee from having his claim considered directly on its merits either by the General Accounting Office under section 236, Revised Statutes, as amended, or by the United States Court of Claims under section 1 of the act of March 3, 1887, 24 Stat. 505, as amended by section 145, act March 3, 1911, 36 Stat. 1136.

The appellant, Secretary of the Navy, did not order the appellee to make refund, nor suggest the

mode, but merely stated the department's views in the matter and accepted the written endorsement of the appellee, executed after opportunity for deliberation and with a full knowledge of the situation, to constitute a proper authority for the checkage of appellee's pay and allowances to satisfy the \$226.67 item.

It was held shortly thereafter in the similar case of an Army officer, *Harant v. McCarl*, Equity No. 47038, decided November 22, 1927, in the Supreme Court of the District of Columbia, that a *demand* having been made on the plaintiff for refund of overpayments theretofore made to him as an officer of the Army and he, in response to the demand, having in writing requested that the amount be deducted in monthly installments from his pay as an officer, plaintiff was not entitled to an injunction directing payment to him of the sum so deducted. No appeal was taken from the ruling of the Supreme Court of the District of Columbia in *Harant v. McCarl* and it would seem the court should have recognized the case is controlling of this case as to the item of \$226.67.

It may be recognized, of course, that generally an officer's principal and, frequently, his only means of meeting his obligations is out of his pay and allowances, and the Congress, in section 1 of the act of June 10, 1896, 29 Stat. 361, has authorized the appellant, Secretary of the Navy, under circumstances warranting such action, to permit officers of the Navy and Marine Corps to make allot-

ments from their pay, "for the support of their families or relatives, for their own savings, or for other purposes." The appellee would seem in no more favorable position to repudiate, through injunction proceedings, his written consent to make refund by checkage of his pay and allowances than he would be to repudiate in that manner allotment deductions made from his pay and allowances with his written consent and remitted to his family or to commercial creditors. The status of the matter is not different than it would be had the appellee remitted his personal check to Lieutenant Jones to cover the \$226.67 item disallowed in Lieutenant Jones' disbursing account.

The appellants are somewhat in doubt as to the basis upon which the court below included this \$226.67 in the order directing payments to be made to the appellee of \$906.67, the court not having indicated any disagreement with its former ruling in the *Harant case* cited. The court did suggest orally, during the hearing of the case, that the communication addressed to the appellee by the appellant, Secretary of the Navy, practically amounted to an order to make the refund and that the endorsement made by the appellee thereon probably was not entirely voluntary.

The appellants, of course, do not contend that the refund as made by the appellee, for the sole purpose of having credit allowed in Lieutenant Jones' disbursing account for the payment appellee had obtained through him, constituted a "voluntary pay-

ment'' in the sense that appellee would be precluded thereby from having his claim decided on its merits and allowed in the General Accounting Office or by the Court of Claims, if the proof presented in that connection by appellee should establish he actually was entitled under the law to the item of pay and allowances on account of which he made refund. In the thousands of such cases which are of record no instance is known of an otherwise valid claim for the sum so refunded being rejected, either by the Government accounting officers or by the Court of Claims, on the basis that the refund constituted a voluntary payment, except where allowance of the claim is prohibited by statute, as it is under certain conditions, by the act of May 26, 1926, 44 Stat. 654.

What the appellants do contend is that there is not alleged or established in the record, nor is there in fact, any duress or other matter which warranted the court below in disregarding and treating as void the written agreement of the appellee to make refund through the "checkage" of his pay and allowances, or in disregarding its own ruling in *Harant v. McCarl*, cited.

The appellee himself had rejected as untenable the ground upon which he had obtained the payment for which credit had been disallowed in Lieutenant Jones' disbursing account, and the court below was without authority to consider or determine originally in this injunction proceeding, or otherwise, whether the appellee might be entitled to re-

tain the sum for pay and allowances on some other ground. The communication addressed to the appellee by the appellant, Secretary of the Navy, certainly did not constitute an unlawful demand, which is essential to be established before an agreement may be avoided on the ground of duress; in fact, the situation of the responsible disbursing officer, Lieutenant Jones, whose own pay and allowances otherwise were required to be withheld by order of the appellants, for the payment of which appellee had the benefit, seemed to require the bringing of the matter to the attention of the appellee and ascertaining whether he would agree to make refund in order that Lieutenant Jones' pay and allowances might not be reduced. The communication to appellee in that connection contained no suggestion that he submit to checkage; that was his own suggestion, and his agreement to make refund was without protest except that the appellee did not acknowledge he "was not entitled to the credit." (R. 6.)

If it was the intention of the appellee, then and now a Navy officer, to refuse to do what equity and good conscience required him to do, the time to make known such intention was in July or August, 1927, instead of when his bill of complaint in the present proceeding was filed on April 2, 1929, more than one and one-half years after his agreement had been fully consummated and after the disbursing account of Lieutenant Jones with the United States had been adjusted accordingly.

The effect of the order of the court below as to this \$226.67 item, if the order is allowed to stand, will be that Lieutenant Jones has failed to establish his right to credit in his disbursing account for the payment made to the appellee. Lieutenant Jones' disbursing account, therefore, necessarily would be for reopening and a deficiency of \$226.67 would have to be found therein for which Lieutenant Jones' own pay and allowances would have to be withheld pursuant to the requirement in section 1766, Revised Statutes.

A diligent examination of the authorities has failed to develop a single precedent supporting the action of the court below in ordering by mandatory injunction the payment to the appellee of this \$226.67 item. On the other hand, the authorities supporting the view that the court had not the power to require the payment of this item by the appellants, or either of them, are too numerous to permit of detailed citation. The appellants limit themselves, therefore, to a few authoritative citations on the principles which seem to control.

One can not recover money alleged as paid under compulsion if it is just what he ought to have paid voluntarily. (30 Cyc. 1311.)

In order to recover moneys paid on the ground of duress, it must appear on the record not only that there was duress, but also that it is against equity and good conscience for the payee to retain the money. (30 Cyc. 1303, 1311; *Mountain Lumber*

Co. et al. v. Davis, Director General of Railroads, et al. (C. C. A. 2d, 1926) 11 F (2d) 219, 221.)

Duress does not arise where the element of illegality is lacking. (12 Ct. Cl. 433, affirmed 101 U. S. 465, 25 L. Ed. 987.)

Where recovery of money is sought on the ground payment was made on compulsion the action is one at law for money had and received to the plaintiff's use and equity ordinarily is without jurisdiction. (16 Cyc. 45, 30 Cyc. 1323; 21 R. C. L. 145.)

Acts induced by duress which operates only on the mind, and falls short of actual physical compulsion, are not void in law, but are voidable only and the election to disaffirm an act induced by duress must be exercised promptly where it has operated to alter the legal rights of others. (*Barnette v. Wells Fargo Nevada Nat. Bank*, 270 U. S. 438, 70 L. Ed. 669.)

A mandatory injunction, like a mandamus, is an extraordinary remedial process which is granted not as a matter of right but in the exercise of a sound judicial discretion. It issues to remedy a wrong, not to promote one, and its office is to *enforce*, not to *establish*, legal right. (*Morrison v. Work*, 266 U. S. 481, 490, *United States v. Deming*, 57 App. D. C. 223.)

Had the appellants, or either of them, on their own initiative, stopped the pay and allowances of the appellee and applied the proceeds to the credit

of Lieutenant Jones in his official account with the United States, the appellee might have enjoined such action under *McCarl et al. v. Cox*, cited, but this the appellants did not do. The purpose of the communication of the appellant, Secretary of the Navy, to the appellee on July 11, 1927 (R. 5), had in view solely and was in anticipation that the appellee desired to conduct his personal affairs in a manner to be expected of an honorable gentleman and an officer of the United States and would not willingly see another officer make good, out of his own pay and allowances, funds of which appellee had the benefit. The appellee's response, apparently given in good faith, was, in effect, that he was willing to make refund through having checkage made of his pay and allowances. The appellee then permitted more than one and one-half years to elapse and until the public accounts were adjusted on the basis of his written agreement and request and then brought this proceeding in equity to repudiate what he had done.

Clearly the court below, in including the \$226.67 item in the sum directed to be paid the appellee, committed error which should be corrected here.

II

An officer of the Navy who has received his full statutory pay and allowances from the Navy appropriations for the fiscal year commencing July 1, 1926, and ending June 30, 1927, is not entitled, on a bill of complaint filed on the equity side of the

Supreme Court of the District of Columbia, to a decree for mandatory injunction against the Comptroller General of the United States and the Secretary of the Navy directing the Secretary of the Navy to pay or cause to be paid an additional \$360 for pay and allowances alleged to be due the officer for the said fiscal year but payment of which had been determined by competent authority to be unauthorized and to be over and above the pay and allowances authorized for the officer under the general statutes and the Navy appropriation for that fiscal year.

In *McCarl, etc., et al. v. Cox*, 8 F. (2d) 669, the record established that the "pay and allowances" of Cox as an officer of the Navy had been withheld to adjust overpayments previously obtained by him (Cox record filed in this court, pp. 2, 3, 4, 5, 16, 17, 21), and it was contended in the oral argument, by counsel in the Supreme Court of the District of Columbia on behalf of the appellant Comptroller General of the United States, that even though the court should determine the withholding of "pay proper" was unauthorized under the case of *Smith v. Jackson*, 241 Fed. 747, affirmed 246 U. S. 388, nevertheless, the "allowances," as distinguished from "pay proper," were not exempt from stoppage. A similar contention was made at page 23 of the brief of the Comptroller General filed in this court in that case and at page 25 of the petition for a writ of certiorari to this court filed on behalf of

the Comptroller General in the Supreme Court of the United States, there having been cited in the said petition in that connection the case of *Jones v. United States*, which had been decided April 13, 1925, 60 Ct. Cls. 552, holding the "allowances" of a naval officer are no part of compensation subject to income tax.

Neither court, however, appears to have considered this contention of the Comptroller General as of any controlling weight, the memorandum opinion entered by Mr. Justice Hoehling December 1, 1924, in the Supreme Court of the District of Columbia (Cox record filed in this court, pp. 32-35), referring to the "pay and allowances" withheld as "salary" and as "salary and other compensation," while this court, in its opinion of November 2, 1925, applied the term "salary" throughout in describing the withheld "pay and allowances," doubtless being impressed that, like in the present case, as the pay, rental allowance, and subsistence allowance, when determined, are payable as a lump sum from one appropriation, viz, pay of the Navy, for the purposes of ordinary usage the terms "pay," "salary," and "compensation" include the "pay proper" and the "allowances" so specifically appropriated for as pay.

In the similar case of an Army officer decided in this court April 4, 1927, *McCarl, etc., et al. v. Pence*, 18 F. (2d) 809, the sum withheld from the pay and allowances of Pence as an officer of the Army

is designated interchangeably as "pay," "salary," and "pay and allowances." It would seem for acceptance, therefore, that in these proceedings by officers to compel by mandatory injunction the payment to them of "salary" or "pay and allowances" withheld, both the pay and the allowances constitute "salary" or "compensation" which may not be withheld, under the circumstances recited in the *Cox* and *Pence* cases.

Neither *McCarl et al. v. Cox*, cited, nor any decided case of which the appellants are aware, supports the order of the court below as to this item of \$360 which the court included in the \$906.67 directed to be paid to the appellee by the Secretary of the Navy.

The item represents a debit entry in the personal account of the appellee for the fiscal year 1927, commencing July 1, 1926, and ending June 30, 1927, to offset an unauthorized credit entry made in the account earlier in the fiscal year. The entry had no effect whatever to increase or diminish the appellee's statutory pay and allowances as appropriated for that fiscal year (R. 5, 6), which pay and allowances he received in full except as affected by the two debit entries of \$200 each enumerated under the above statement in sections C and D, which two debit entries are conceded by the appellants, as already explained, to have resulted in a withholding of an aggregate of \$400 in pay and

allowances otherwise due and payable to appellee out of the Navy appropriations for said fiscal year.

For convenience of reference sections C, D, and E of the statement are repeated here:

C

November 1, 1925, to January 31, 1926 (by N. J. Halpine) -----	\$120.00	July 1, 1927, to September 30, 1927 (by W. Elliott) -----	\$120.00
February 1, 1926, to June 30, 1926 (by W. Elliott) -----	200.00	July 1, 1926, to September 30, 1926 (by W. Elliott) -----	200.00

(The two debit items in this section resulted in a withholding of equivalent statutory pay and allowances; payment thereof to appellee directed in order of court below and conceded to be controlled by *McCarl et al. v. Cox.*)

D

February 1, 1926, to June 30, 1926 (duplicate credit and payment by W. Elliott) --	\$200.00	April 1, 1927, to June 30, 1927 (by W. Elliott; applied to an undisputed duplicate payment and not claimed in bill of complaint) ---	\$200.00
--	----------	--	----------

E

July 1, 1926, to March 31, 1927 (by W. Elliott) -----	\$360.00	April 1, 1927, to June 30, 1927 (by W. Elliott) ---	\$360.00
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(Credit and debit here did not increase or diminish appellee's statutory pay and allowances which were paid him in full as appropriated.)

It has been suggested that if the allowances did not constitute a part of the appellee's "salary" or "compensation" for the fiscal year 1927, the \$360 overpaid to him from "Pay of the Navy, 1927," by reason of the erroneous credit of rental allowance during the first nine months of that fiscal year could not be treated as an overpayment of "salary"

or "compensation" for such nine months, but that only unpaid "allowances" accruing under that appropriation were authorized to be proportionately reduced to adjust the overpayment so made, and, therefore, the case, to the extent that pay proper thus was reduced, would be within the rule of *McCarl, etc., et al. v. Cox*, 8 F. (2d), 669, notwithstanding the result would be a total payment for "pay and allowances" from the appropriation "Pay of the Navy, 1927," in excess of what Congress had authorized for such "pay and allowances," but, on the other hand, that if the allowances did constitute a part of the appellee's "salary" or "compensation" for the fiscal year 1927, the case would not be within the rule of *McCarl, etc., et al. v. Cox*, cited, but would be analogous to that of an officer who, for example, during the first nine months of any fiscal year received a greater proportionate part of his appropriated salary than he was entitled to receive and, therefore, during the remaining period of the fiscal year could receive only the remaining and unpaid proportion of his appropriated salary.

Should this Court take the view that the allowances of the appellee did not constitute a part of his "salary" or "compensation" for the fiscal year 1927, the case would be for remanding with directions that the pleadings be amended to show to what extent the debit entry of \$360 reduced his pay proper, the present record having proceeded in the

view that for the purposes of this proceeding the "pay and allowances" appropriated for as one item or fund constitute "salary" or "compensation."

The application, as understood by the appellants, of *McCarl et al. v. Cox*, cited, and of the leading case of this character, *Smith v. Jackson*, 241 Fed. 747, affirmed 246 U. S. 388, to the several items, debit and credit, in appellee's account, is susceptible of illustration more readily by reference to the salary of a member of the President's Cabinet.

Section 4, act of March 4, 1925, 43 Stat. 1301, fixes this salary at \$15,000 per annum and the several annual appropriation acts for the respective Executive Departments each have contained an appropriation of \$15,000 to pay this salary. Irrespective of debit and credit entries a disbursing officer, or a subordinate in his office, may make between July 1 and June 30 of any fiscal year in the personal salary account of a Cabinet Officer, the disbursing officer is not authorized to pay as such salary more or less than \$15,000.

Assuming that through error in debiting payments as made, or other error, a disbursing officer should pay a Cabinet Officer during one fiscal year, \$20,000, and credit for the excess of \$5,000 should be disallowed in the settlement of his disbursing account, due to the lack of an appropriation which could be charged therewith, the disbursing officer would not be authorized under the cited decisions, to

withhold the \$5,000, on his own initiative, from the \$15,000 appropriated to pay the salary of such Cabinet Officer in any succeeding fiscal year and thus pay but \$10,000 for the latter year.

If, however, the disbursing officer, through an unauthorized adjustment of debits and credits in the salary account and contrary to law, should pay the Cabinet Officer during the first six months of any fiscal year, the sum of \$10,000 in salary, it would be the disbursing officer's plain duty to adjust the account by debit entry in such manner as would show but a \$5,000 balance due over the remaining six months of the fiscal year and to pay no more than that amount, the total payment of salary authorized for any fiscal year, under the general controlling statute and the appropriations, being limited to \$15,000.

It is not to be presumed a court would, by a decree for mandatory injunction, direct the disbursing officer to pay a proportionate part of the \$15,000 salary for the last six months of a fiscal year—that is, \$7,500—if the disbursing officer already had paid \$10,000 from the available \$15,000 appropriation during the first six months of the fiscal year, and, if a court should fall into error and issue such a decree, as the court below has done with respect to the \$360 debit and credit adjustment item included in appellee's bill of complaint, the disbursing officer would be powerless to comply with the court's order as to

the \$2,500 so directed to be paid in excess of the appropriation provided by the Congress.

The appellants must ask the court's indulgence for dwelling so at length on what seems a simple matter, but there is pleaded in extenuation the importance of the principle involved and the fact that the appellant, Secretary of the Navy, at this moment is embarrassed by having outstanding against him a mandatory order of the Supreme Court of the District of Columbia directing him to pay to the appellee as pay and allowances under Navy appropriations the sum of \$906.67, whereas \$360 of this sum the appellant, Secretary of the Navy, is forbidden to pay by the Constitution and by statutory laws of which the court is bound to take judicial notice.

The failure to pay the salary of a public officer is an official delinquency, subject to be summarily corrected by mandamus or mandatory injunction only if the duty be at once plain, imperative, and entirely ministerial; the duty not only must be ministerial but it must be a duty which exists at the time when application is made for a summary order to compel payment, and there is no duty to pay if there is no available appropriation in the custody or control of those against whom the order is sought at the time of application. (*Reeside v. Walker* (Dist. Col. 1850), 11 How. 272; *Ness v. Fisher*, 223 U. S. 683, 694; *Smith v. Jackson*, 241

Fed. 747, 761, affirmed 246 U. S. 388; 20 Op. Atty. Gen. 626.)

Section 2 of the Tucker Act of March 3, 1887, 24 Stat. 505, as amended by section 2, act of June 27, 1898, 30 Stat. 495, cited, in express terms prohibits the Supreme Court of the District of Columbia from taking jurisdiction of any claim for pay and allowances by a Navy Officer, payment of which has been refused by the Government accounting officers or by the Navy Department on the ground either that payment of the claim is unauthorized by general law or that there is no appropriation available to pay it, and the authorities are too numerous to require citation which deny the right of the court to review the action so rejecting such claim by mandamus or mandatory injunction. The claimant's exclusive remedy in cases of this character is by suit directly against the United States by petition in the United States Court of Claims. (Section 1, act March 3, 1887, 24 Stat. 505, as amended by section 145, act March 3, 1911, 36 Stat. 1136, cited.)

CONCLUSION

It is respectfully submitted the order of the court below should be remanded with instructions to reduce the \$906.67 which the appellant, Secretary of the Navy, therein is directed to pay the plaintiff, by \$226.67 and by \$360, or to the net sum of \$320,

and that the entire cost of the appeal proceedings in this court should be upon the appellee.

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R. L. GOLZE,
*General Counsel, General
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H. O. HOAGLAND,
*Attorney, General Accounting Office,
For the Appellants.*

APPENDIX

Louis J. Harant, Plaintiff, v. J. Raymond McCarl,
Comptroller General of the United States.
Equity, No. 47,038

MEMORANDUM

Plaintiff is an officer, first lieutenant, Infantry, U. S. Army, retired September 16, 1924; and, as such, received pay and allowances up to May 1, 1925. In February, 1925, he was notified by defendant of an indebtedness in the sum of \$1,150.82, being the amount of alleged *overpayment* theretofore made him for dependency allowances for the period, June, 1918, to March, 1921 (being prior to July 1, 1923); on which amount, however, credit was allowed in the sum of \$214.93, covering an *underpayment* made plaintiff while in training, January 5, 1918, to April 19th, 1918, for a commission in the United States Army; thus leaving a total net alleged indebtedness of plaintiff in the sum of \$935.89. Thereupon, and in response to the demand in that behalf, plaintiff, on March 10, 1925, in writing, authorized the General Accounting Office to deduct the sum of \$25 from his monthly pay and allowances, beginning with the month of May, 1925; on March 20, 1925, the General Accounting Office, in writing, advised plaintiff that that office had no objection to the payment of the indebtedness in monthly installments, as so suggested by plaintiff, *supra*; and, on March 26, 1925,

plaintiff, in writing, thus advised the Army disbursing officer, in Washington, D. C., who issues the checks for the pay of retired officers of the Army.

“It is respectfully requested that the amount of \$25 be deducted monthly from my pay, effective as of May 1, 1925.”

Apparently, the monthly deductions from plaintiff's pay, as so arranged and authorized, *supra*, and beginning for the same May 1, 1925, continued on down during the ensuing months, until the filing of the bill of complaint herein, on June 1, 1927.

According to the answer of defendant herein, plaintiff, after the passage of the acts of May 26 and July 3, 1926, filed claim with the General Accounting Office for refund of the amounts so by him theretofore requested to be deducted from his monthly pay, and which claim remains under consideration and undisposed of in that office.

From the foregoing, it sufficiently appears that, unlike the former cases presented for determination, involving deductions made from the monthly pay of officers of the Army or Navy of the United States (at least, as far as the Court recalls, or as far as such former cases have been brought to its attention); the deductions here complained of were not brought about by the so-called stoppage orders, but were the result of consent, as well as written request, of plaintiff that the deductions, at the rate of \$25 per month, be made from his pay.

Therefore, the Court is of opinion that no case is presented herein authorizing injunctive relief; and, accordingly, decree may be prepared, and submitted upon notice, dismissing the bill of complaint; but without prejudice to the determination of the question of the right of plaintiff to the refund

claimed by him, either before the General Accounting Office, or in such other action or before such tribunal as may have jurisdiction to hear and determine the question.

A. A. HOEHLING, *Justice*.

NOVEMBER 22, 1927.

FOR MR. CHIEF JUSTICE

COURT OF APPEALS
DISTRICT OF COLUMBIA
FILED

DEC 3 - 1929

Henry W. Hodges
clerk.

IN THE
Court of Appeals, District of Columbia

APRIL TERM, 1929.

No. 5038.

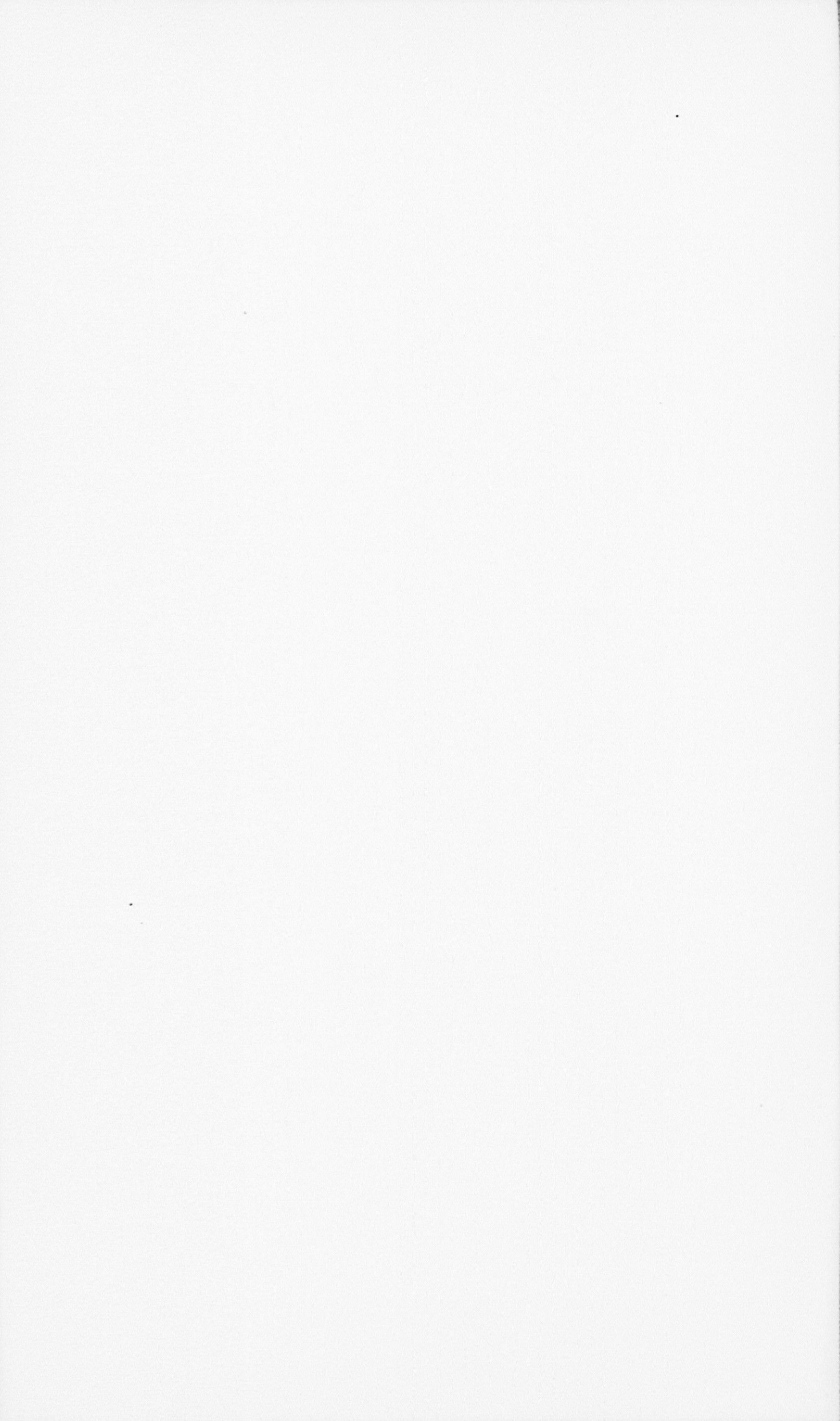
J. RAYMOND MCCARL, COMPTROLLER GENERAL, AND
CHARLES FRANCIS ADAMS, SECRETARY OF THE NAVY,
Appellants,

v.

ALLISON A. BROCK, *Appellee.*

BRIEF FOR APPELLEE.

S. T. ANSELL,
E. S. BAILEY,
GEORGE M. WILMETH,
Attorneys for Appellee.



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BRIEF FOR APPELLEE.

STATEMENT OF THE CASE.

This is a Navy Pay Stoppage case, on appeal from a decree enjoining appellants from interference with, and directing the Secretary of the Navy to make, payment to appellee of \$906.67 withheld by appellants from appellee's pay as a naval officer to reimburse the government for alleged overpayments to appellee of dependency allowances. Appellee, a Chief Pay Clerk, a commissioned officer of the Navy, was paid monthly depen-

dependency allowances aggregating this amount, as an officer with dependents (wife and mother). Thereafter appellant McCarl ruled that appellee was not entitled to these dependency allowances, which had been paid to him in the usual way by Navy disbursing officers, and then appellant McCarl, in cooperation with the Navy Department, proceeded to stop appellee's regular monthly pay to make good the alleged loss to the government due to the alleged illegal payment of appellee's allowances.

The method pursued was indirect but effective: The Comptroller General having ruled that appellee "was paid dependency allowances without his having established such dependency" (that is, without his having done so to that official's satisfaction) proceeded to disallow the alleged illegal payments of dependency allowances in the accounts of the disbursing officers who had made the payments; then he and the Navy Department advised the disbursing officers that said payments had been disallowed, that the disbursing officers and their sureties had thus become liable, and that in the absence of reimbursement the disbursing officers would have their own compensation stopped entirely. What the disbursing officers then did, with the authority of the Comptroller General and the Navy Department, is stated in the Comptroller General's answer (R. pp. 4 and 5) :

"* * * the aforesaid Navy disbursing officers thus having become liable to have their own compensation stopped entirely pursuant to the provisions in section 1766, Revised Statutes, prohibiting the payment of compensation to an officer found in arrears in his accounts, and their sureties likewise having become liable to satisfy the United States for the unauthorized payments from the public

funds they had made to the plaintiff, undertook to discharge their several obligations to account by collecting the amounts of the overpayment from plaintiff * * *."

That is, the disbursing officers, by the authority and suggestion of the Comptroller General and the Department, docked plaintiff's pay monthly until the amount of the alleged over-payments was collected out of appellee's pay, the disallowances in the accounts of the disbursing officers cleared, and the government thus reimbursed out of appellee's pay.

ARGUMENT.

To aid the court in following, so far at least as we ourselves are able to follow, the defenses and argument of the Comptroller General, we also will adopt his method and regard the \$906.67 found by the lower court to have been unlawfully withheld from this officer's pay as composed of three items:

- (1) \$226.67 allowances paid monthly in 1923 and stopped in 1927;
- (2) \$360.00 allowances paid monthly from July, 1926, to March 31, 1927, and stopped April 1, 1927 to June 30, 1927;
- (3) \$320.00 allowances paid monthly in 1925-1926 and stopped in 1927.

We will discuss these items of stoppage in inverse order.

The \$320 Stoppage.

The Comptroller General, in the court below, made no special defense as to this stoppage; he made only

the general defense that he has the power thus to stop an officer's pay in the exercise of which he is beyond judicial control—a stock defense which, though thoroughly discredited ever since *McCarl v. Cox*, 56 App. D. C. 27, (1925) and the other Pay Stoppage Cases, appellant employs persistently and employed in this case in the court below. But in his Brief in this court he says:

“The appellants *now* regard the case of *McCarl et al v. Cox* to be controlling of this \$320 item”—

and adds—

“as to it no appeal was noted from the order of the court below directing it to be paid as a part of \$906.67 directed therein to be paid”—

a statement which the record disproves.

It seems then that, as to this amount, the appellant at last concedes the unlawfulness of the stoppage.

The \$360 Stoppage.

It is admitted that this amount as dependency allowances was paid to appellee in the usual way by the disbursing officers and that afterward it was stopped against his pay. Appellant's only defense is that since this amount of dependency allowances was paid to appellee and stopped against his pay both in the same fiscal year, it was not a pay stoppage at all. See par. (4) of the Answer, page 6 of the Record. In his Answer (table, middle p. 5 Record) he says that this item of allowances was paid appellee for the period July 1, 1926, to March 31, 1927, and was stopped monthly over the period April 1 to June 30, 1927. He concludes that

this is but a "credit and offsetting debit adjustment of this \$360 in plaintiff's (appellee's) account during the fiscal year 1927," which "neither resulted in increasing or decreasing his pay and allowances as authorized in that fiscal year's appropriation Act." He admits that this amount, like all of the \$906.67 was actually paid appellee monthly by the disbursing officer as allowances and that it was thereafter deducted from his compensation. It is not even suggested that it was paid through mistake, and it is admitted by necessary inference that appellee was entitled to this allowance if entitled to any. The only argument is that if allowances are paid month after month in due course and the Comptroller General thereafter holds that the officer was not entitled to the allowances and docks them from the officer's pay before the end of the same fiscal year in which they are paid, there is no pay stoppage. It would be strange if the fiscal year could work such magic. If it was unlawful to stop the pay on July 1, 1927, it should be equally unlawful to stop it on the day before.

The \$226.67 Stoppage.

The Comptroller General's defense is that this officer "agreed to make refund" of this amount. This "agreement" is deduced out of a letter written appellee by the Navy Department in the name of the Secretary of the Navy dated July 11, 1927, and the officer's endorsement thereon dated August 6, 1927, parts of which are quoted in the Comptroller General's Answer (bottom p. 5 and p. 6 of the Record) as follows:

(Department's letter)

"2. * * * the department considers that you should promptly refund the sum of \$226.67, the

amount disallowed in the accounts of Lieutenant Jones, Supply Corps, by reason of increased allowances paid to you on the ground which you failed satisfactorily to substantiate and which you have since rejected in favor of a totally different ground.

“3. You will endorse hereon, with a prompt return of papers, your intentions relative to refunding the above sum of \$226.67, for which sum the department considers for the reasons above stated, you are justly indebted to the Government.”

(Officer's endorsement)

“2. My account is now being checked \$440 by Lieutenant W. Elliott (SC), U. S. N., on account of the General Accounting Office in certificate No. K-8452-N dated May 18, 1927, having refused to accept copy of marriage certificate for crediting the allowance while carried on his rolls from February 1, 1926, and I have not drawn any money since May 31st, excepting subsistence allowance.

“3. I am willing for checkage to be made, however, I do not acknowledge that I was not entitled to the credit.”

The Department wrote this letter to this officer nearly two years after *McCarl v. Cox* was decided. Appellant in his Answer calls this endorsement an “agreement” and in his Brief, a “written consent and request” for the checkage of this amount. The Department's letter strikes us as an obvious effort to achieve an unlawful object through threat of disciplinary action. The Department had no lawful authority to stop this officer's pay, nor could the officer confer such power upon the department, nor divest himself of his right to his statutory pay, by an agreement. *Glavey v. United States*, 182 U. S. 595; *United States v. Andrews*, 240

U. S. 90. Besides, this officer did not agree or consent; it was not agreement but submission. (Hill v. D. C., 7 Mackey, 481.)

CONCLUSION.

We respectfully submit that there is no reason for modifying the decree and every reason for affirming it.

Respectfully submitted,

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E. S. BAILEY,

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Attorneys for Appellee.